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No. 94-1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

— v. —

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Rodney O. Thorson*
Mark E. Herlihy
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Avenue, N. W.
Washington, D. C. 20005
(202) 371-7500
Attorneys for Respondent
American Cyanamid Company

* *Counsel of Record for Respondent*

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QUESTION PRESENTED

Respondent American Cyanamid Company ("Cyanamid") respectfully urges that, of the two issues petitioner now seeks to raise, only the second was pressed by petitioner in, or passed on by, the courts below. That issue is:

Should Cyanamid be treated as a limited purpose public figure with respect to accusations that it had breached a marketing agreement, when Cyanamid's marketing activities, including those related to the drug in question, had not created any public controversy related to the contractual adequacy of Cyanamid's marketing efforts?

RULE 29.1 STATEMENT

In December 1994, American Cyanamid Company became a wholly-owned subsidiary of American Home Products Corporation, a publicly held Delaware corporation. Lederle Laboratories, referred to in the record, is a division of American Cyanamid Company. American Home Products Corporation may be deemed a parent of Genetics Institute, Inc. Other than wholly-owned subsidiaries, American Cyanamid Company may be deemed to be a parent of the following corporations:

B. Braun-Dexon GmBH
B. Braun-Dexon Portugal
B. Braun-Dexon S.A.
Bionet, S.A.
Biotechnology R & D Corp.
CY Barranquilla S.A.
CY Kimyevi Madde ve ILAC
Cyanamid Chile Limitada
Cyanamid India Limited
Cyanamid Italia S.p.A.
Cyanamid Korea Inc.
Cyanamid (Pakistan) Ltd.
Cyanamid Taiwan Corp.
Cyanotech Corporation
Cytec Industries, Inc.
Durachemie GmBH & Co. KG
Eximp S.A.
Immunex Corporation
IRBI, S.p.A.

Laboratorios Sobrino S.A.
Labs Lederle SA
Lederle (Japan) Ltd.
Mitsui-Cyanamid Ltd.
S. Africa Cyanamid Pty Ltd.
Laminate Industries
Prod-Distribu Sobrino S.A.
QLT Phototherapeutics, Inc.
(formerly Quadra Logic Technologies, Inc.)
Sumutex SA de CV
Suzhou Led. Pharm. Co.
Takeda Italia Farmaceutic
Yuhan-Cyanamid, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Cyanamid Company respectfully requests that this Court deny the petition for a writ of certiorari, pursuant to which petitioner seeks review of a *per curiam* unpublished disposition of the court of appeals.

STATEMENT OF THE CASE

The petitioner, Mylan Pharmaceuticals, Inc. ("Mylan"), a Morgantown, West Virginia company, commenced this litigation against American Cyanamid Company ("Cyanamid") in federal court in West Virginia, with jurisdiction based on diversity of citizenship. Mylan sought more than $1 billion in

damages, a declaration of termination, and equitable remedies for various alleged breaches of a contract under which it had granted Cyanamid the exclusive right to market a potassium sparing diuretic drug developed by Mylan, which the FDA had approved for the treatment of hypertension. In a series of public statements, some of which predated the institution of Mylan's contract action, Mylan officials, including its board chairman Roy McKnight, and its Vice President – Investor and Public Relations Patricia Sunseri, accused Cyanamid of breaching the contract and abandoning the product, which Cyanamid sold under the Maxzide® brand name, and portrayed Cyanamid as an incompetent marketer of pharmaceuticals and an unreliable business partner.[1] These disparaging statements were widely disseminated in the industry trade press as well as in general newspapers. Cyanamid both denied the contract claims, and countersued, alleging that Mylan's and McKnight's remarks were false and had tarnished its business reputation.

Mylan moved to dismiss the defamation counterclaim under FED. R. CIV. P. 12, urging a plethora of defenses, including a variety of common law defenses and privileges. Asserting that its breach of contract lawsuit was a matter of public interest in the pharmaceutical industry, Mylan limited its assertion of a first amendment defense under this Court's decisions in *New York Times v. Sullivan*, 376 U. S. 254 (1964), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to the unequivocal claim that "Cyanamid is a limited purpose public figure required to establish actual or constitutional malice as a prerequisite to recovery in a defamation action based on statements to others

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[1] The Petition sets forth the alleged defamatory statements at pp. 3 to 5.

in the industry concerning this litigation." (Mylan's memorandum in support of motion to dismiss; J.A. 131.)[2] Cyanamid argued in opposition that no matter of public interest had existed prior to Mylan's own statements and the filing of its lawsuit, and that this Court's rulings in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), required rejection of Mylan's proposition that mere participation —and especially involuntary participation— in a lawsuit amounted to involvement in a "public controversy" for purposes of applying the limited purpose public figure standard. (Cyanamid's memorandum in opposition to motion to dismiss at 23-26.) Mylan made no argument that Cyanamid should be treated as an all-purpose public figure, either on the basis of its status as a corporation or on any other basis.

The trial court denied Mylan's motion to dismiss the defamation counterclaim, noting that the issue of Cyanamid's public figure status was "a matter which must be developed through appropriate discovery and cannot be decided merely by looking at the four corners of the ... counterclaim." (Mem. Opinion and Order, filed Feb. 20, 1992; J.A. 278, 284.) The trial court also noted a willingness to consider the issue again on summary judgment. (*Id.*, J.A. 285.)

Shortly prior to trial, Mylan again sought to dispose of Cyanamid's defamation counterclaim, this time seeking summary judgment under FED. R. CIV. P. 56. Mylan had not

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[2] References to "J.A. __" are to the designated pages in the parties' Joint Appendix to the Record on Appeal below. References to "App. __" are to the designated pages of the Appendix filed herein. Materials cited as "Mylan's" were filed jointly on behalf of Mylan and McKnight.

developed a factual record regarding either the existence of a public controversy or the voluntariness of Cyanamid's role in any such public controversy, and failed to assert that any uncontested facts relating to these issues justified granting its motion. Instead, again relying solely upon the existence of its lawsuit as a factual predicate, Mylan reiterated the specific proposition that "[u]nder these circumstances, Cyanamid is a 'limited purpose' public figure required to show 'constitutional malice' in order to prevail on its defamation claim." (Mylan's memorandum in support of motion for summary judgment; J.A. 303.) Again, Mylan did not argue that Cyanamid should be treated as an all-purpose public figure.

Two weeks prior to trial the district court granted Mylan's motion, ruling that Cyanamid was a limited purpose (or "vortex") public figure under this Court's 1974 decision in *Gertz*. The court did not address the issue of whether Cyanamid could be treated as an all-purpose public figure. The court also ruled that the evidentiary record would not support a finding of constitutional malice and thus dismissed the counterclaim. (Mem. Opinion and Order, filed July 27, 1993; J.A. 1146-59.)

In addressing the limited purpose public figure issue, the district court found that by entering into the Maxzide® marketing agreement, and then by marketing the drug with an intensive launch and aggressive follow-up campaign, Cyanamid had "volunteered for an activity out of which publicity was generated through the comments made by McKnight and Sunseri." (*Id.*, J.A. 1156.) The trial court also noted: "[c]ertainly, Cyanamid's involvement with this major drug in a highly competitive and regulated industry would lead it to foresee the activity out of which the alleged defamatory statements would occur." (*Id.*, J.A. 1157.)

Following an extended jury trial in which Cyanamid defeated each of Mylan's breach of contract claims, Cyanamid appealed, among other things, the grant of summary judgment against its defamation counterclaim. Cyanamid urged that the trial court had erred by failing to follow controlling precedent of this Court and in the Fourth Circuit requiring that, before a finding of limited purpose public figure status can be made, a "'pre-existing involvement in the particular matter of public concern and controversy'" on the part of the defamation plaintiff must be established. (Cyanamid's brief in support of appeal at 19 (citing *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 687 (4th Cir. 1989) (*"Veribanc"*)). Cyanamid noted that the record failed to establish any direct link between Cyanamid's promotion of Maxzide® as a treatment for hypertension and the issues raised by Mylan's and McKnight's defamatory statements: Cyanamid's probity as a contracting partner, and its competence as a marketer. Mylan's defamatory statements thus did not address a "matter of public concern or controversy" in which Cyanamid had a "pre-existing involvement." *Veribanc*, 866 F.2d at 687. Cyanamid noted further that, under applicable precedent defining a "matter of public concern," it could not be said that Mylan's defamatory statements addressed such an issue at all. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (speech "solely in the individual interest of the speaker and its specific business audience" does not concern a public issue, and does not require the protection of the "actual malice" standard).

In an unreported per curiam disposition,[3] the Court of Appeals for the Fourth Circuit reversed, holding that no public controversy existed in this case.[4] It found instead the conflict between Mylan and Cyanamid was "a purely private contractual dispute" notwithstanding any public attention it had drawn. Thus, Cyanamid was not a limited purpose public figure and proof of actual malice (which the district court had ruled was lacking) was not necessary for Cyanamid's claim. No rehearing was sought by the petitioners, and no suggestion for rehearing en banc was made.[5]

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[3] Under Sections 36.5 and 36.6 of the Internal Operating Procedures of the Court of Appeals for the Fourth Circuit (1994) ("4th Cir. I.O.P."), unreported dispositions are not deemed to have precedential value, although citation to such decisions is not barred absolutely. In the Fourth Circuit, the decision not to publish an opinion implies a determination by the author of the opinion or by a majority of the panel that, among other things, the opinion does not involve a legal issue of continuing public interest, and does not create a conflict with a decision of another circuit. *See* 4th Cir. I.O.P. Section 36.4, quoted *infra*, p. 11.

[4] The court of appeals rejected two other claims of error made by Cyanamid and also affirmed the jury verdicts and judgments against Mylan on its breach of contract claims which Mylan had raised in cross appeals.

[5] Following remand, Cyanamid moved under 28 U.S.C. §1404(a) (1988) to transfer the case from West Virginia to New Jersey for trial of the defamation counterclaim, the only remaining claim in the case. On May 30, 1995, the district court entered an order granting that motion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THRESHOLD REASONS TO DENY THE PETITION

A. The First Issue Presented By Petitioners was Neither Pressed, Nor Passed On by the Courts Below.

The Court should deny petitioners' attempt to obtain review of the all-purpose public figure issue because they failed to press that issue in the courts below, and neither court addressed it. This Court observes a settled rule that, except in extraordinary circumstances, it will not review a question "not pressed or passed upon below." *U.S. v. Williams*, 504 U.S. 36, 41 (1992) (petition not dismissed because issue was expressly decided below); *Sisson v. Ruby*, 497 U.S. 358, 359 (1990) (declining to consider argument because petitioner failed to raise it below); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (same); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329 (1967) (declining to consider argument because petitioner failed to raise it below); *Lawn v. United States*, 355 U.S. 339, 362 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.") (citations omitted); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("[The Supreme Court] sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). Mylan raises no exceptional circumstances warranting issuance of the writ of certiorari.

This Court has traditionally refused to review issues not raised or passed on below because the "decision to grant certio-

rari represents a commitment of scarce judicial resources ...." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). It is particularly appropriate for the Court to decline to consider issues not fully aired below because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Petitioners' sole reference to the all-purpose public figure issue in their briefing before the court of appeals was in a footnote: "By arguing that Cyanamid is a limited purpose public figure Mylan does not foreclose the possibility that Cyanamid is an all-purpose public figure." (Opening and Answering Brief of Appellees at 49, n.30 (citation omitted)). Mylan and McKnight seek to dignify this non-argument as a "*suggestion* that Cyanamid could be held to be an all-purpose public figure[,]" but they are forced to concede that the court of appeals ignored this off-hand mention of an issue that was neither briefed by the parties nor developed in the factual record. (Petition at 9 (emphasis added)).

The record below in this case regarding the all-purpose public figure issue falls woefully short of the standards this Court has articulated regarding the adequate preservation of an issue for review by writ of certiorari. In *City of Canton v. Harris*, 489 U.S. 378 (1989), for example, petitioner was a municipality challenging the actionability under 42 U.S.C. § 1983 of an alleged failure to train police officers to determine when detainees required medical assistance. Respondent argued that the writ should be dismissed as improvidently granted on the ground that petitioner had failed to press that issue in the courts below, and, in fact, had arguably conceded actionability. The Court declined to dismiss the writ, noting that although the

"petitioner's litigation posture with respect to the questions presented here has not been consistent ...," petitioner had sufficiently pressed its argument for review purposes because, "at each stage in the proceedings below, petitioner contested any finding of liability on this ground, with objections of varying specificity." *Id.*, at 384. The Court also noted, however, that even though the litigation posture of the petitioner had permitted the Sixth Circuit to render a decision on the question presented for review, the petitioner's inconsistent presentations of the issue below "might have been so inexact that we would have denied certiorari had this matter been brought to our attention at the appropriate stage in the proceedings." *Id.*, at 385; *see* Sup. Ct. R. 15.1 ("Any defect of this sort in the proceedings below may be deemed waived ... if not called to the attention of the Court by the respondent in the brief in opposition.") If the degree of argument presented by petitioner in *City of Canton* rendered questionable the exercise of the writ in that case, the utter neglect of the all-purpose public figure issue by petitioners below cannot possibly lead to the issuance of the writ to review that issue in this case.

B. The Opinion Below is an Unpublished Disposition and Does Not Warrant Review.

The decision below is an unpublished disposition, the significance of which is defined by 4th Cir. I.O.P. Sections 36.5 and 36.6. Those sections state in relevant part:

> *36.5 Unpublished dispositions.* Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court.

> They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel.
> ...
>
> Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.
>
> *36.6 Citation of unpublished dispositions.* In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs or oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. ...

The significance of these statements by the Circuit, directly affecting the disposition for which review is sought here, is highlighted by the complementary statement in 4th Cir. I.O.P. Section 36.4 regarding the considerations applicable to the decision to publish an opinion:

36.4 Publication of decisions. Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication, and all members of the court have acknowledged in writing their receipt of the proposed opinion. ...

Cyanamid respectfully submits that the same considerations that prompt this Court, in the ordinary course, to decline issuance of the writ in cases in which an issue has not been pressed or passed on below, suggest that the Court should similarly decline to issue the writ in cases in which the reasoning of the court below may not be fully articulated.

In the unpublished disposition at bar, the Fourth Circuit explicitly applied a two-part test for determining if a defamation plaintiff has limited purpose public figure status it

had set forth and analyzed in detail in a very recent published decision, *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994), a case decided after this case had been briefed below. (App. 6a). In *Foretich*, a case that petitioners inexplicably fail to draw to this Court's attention, the Fourth Circuit conducted an exhaustive historical review of the development of the limited purpose public figure doctrine by this Court in *Gertz*, *Firestone*, *Wolston*, and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), culminating in a two-part inquiry for determining public figure status: "[f]irst, was there a particular '*public* controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Foretich*, 37 F.3d at 1553 (emphasis in original). The court then examined its own application of that doctrine through an extensive series of cases including *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212 (1991);*Veribanc*, 866 F.2d 681; *National Found. for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983) (*"NFCR"*); *Fitzgerald v. Penthouse Int'l Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983), and *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981). In addition, the court in *Foretich* provided a painstaking exposition of the fact-bound inquiry that guided its application both of the two-part, public controversy/ plaintiff's participation inquiry, and of the multi-factor test it had developed to assess the latter half of that inquiry —an aspect of the analysis not reached in the case at bar, in which the court below terminated its inquiry when it found that no public controversy existed. Even a cursory comparison of the

case at bar with the complete analysis set forth in *Foretich* strongly suggests that, if this Court were inclined to re-examine the now well-developed limited purpose public figure doctrine of *Gertz*, this case would be a poor vehicle for such a re-examination, as it presents only one element, the inquiry into the existence of a public controversy, of the multifaceted analysis required to implement *Gertz*, and does so in a highly particularized factual context offering little opportunity for a broadly prescriptive analysis.

II. THE HOLDING BELOW DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS, INCLUDING *GERTZ*, AND POSES NO CONFLICT AMONG THE CIRCUITS.

The concept of a limited purpose public figure grew out of the landmark decision in *New York Times v. Sullivan*, and was articulated by the Court in *Gertz*, following less successful attempts to formulate a rule harmonizing state law concerns for protecting the reputational interests of persons other than public officials with First Amendment concerns in *Curtis Publishing Co.*, and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Gertz*, the Court delineated three potential classes of public figures whose reputational interests would be subordinated to the public interest in robust debate over matters of public concern protected by the First Amendment. The Court identified an "exceedingly rare" class of persons who acquire involuntary celebrity (*id.*, at 345), but the principal distinction the Court drew was between an all-purpose public figure and a limited purpose public figure. That distinction was succinctly expressed as follows:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id., at 351.

The Court emphasized that an evidentiary showing of involvement on the part of the defamation plaintiff in the particular public controversy giving rise to the defamation is essential to the invocation of First Amendment protections by the defamation defendant. Thus, although the defamation plaintiff in *Gertz* had "long been active in community and professional affairs," had "served as an officer of local civic groups and of various professional organizations" and had "published several books and articles on legal subjects" (*id.*, at 351), he was not thereby deemed to have cast off the status of a private individual:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. *It is preferable to reduce the public-figure question to a more meaningful*

> *context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*

Id., at 352 (emphasis added).

The *Gertz* decision represented a successful effort by the Court to "come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity." *Id.*, at 354 (Blackmun, J., concurring.)[6] The majority in *Gertz* explicitly recognized that the balance it sought to strike between the competing and sometimes conflicting values of a robust and unconstrained public discourse on the one hand, and the reputational interests of private persons on the other, is a difficult and fact specific task that might be more suited to a case-by case analysis than the promulgation of a general rule. The Court also recognized, however, that an *ad hoc* approach was unfeasible, because it "would lead to unpredictable results and uncertain expectations, and it could render [the Court's] duty to supervise the lower courts unmanageable." *Id.*, at 343. It therefore intentionally chose to create "broad rules of general application[,]" acknowledging that "it is often true that not all of the considerations which justify the adoption of a given rule will obtain in each particular case under its authority." *Id.*, at 343-44.

Since its decision in *Gertz*, the Court has addressed the distinction between a private plaintiff and a limited purpose public figure three times, in *Firestone*, 424 U.S. 448,

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[6] In *Rosenbloom*, a plurality of the Court, in an opinion by Justice Brennan, had adopted a test that protected defamatory falsehoods regarding private individuals if the statements concerned matters of general or public interest. 403 U.S. at 52.

Hutchinson, 443 U.S. 111, and *Wolston*, 443 U.S. 157. Taken together, these four cases mandate the "two-part inquiry" identified by the Fourth Circuit in *Foretich* and earlier reported decisions, and applied below in the instant case. In each of the three cases following *Gertz*, the Court devoted specific attention to the first element of that inquiry, the existence of a particular public controversy. *See*, *Firestone*, 424 U.S. at 453-55 (holding that the divorce proceedings of Palm Beach socialite Mary Alice Firestone did not constitute a public controversy); *Hutchinson*, 443 U.S. at 135 (no particular public controversy existed regarding Hutchinson's behavioral research); *Wolston*, 443 U.S. at 166, n. 8 (no public controversy in the sense of public debate existed with respect to grand jury investigation into Soviet espionage activities in the U.S.) Thus, the determinative analysis in the case at bar, the inquiry into the existence of a particular public controversy, is the single area in which this Court has given the greatest amount of guidance.

Petitioners assign error to the Fourth Circuit's treatment of the public controversy analysis in this case, on the ground that the Fourth Circuit's approach "improperly constricts the definition of 'public controversy' for purposes of the limited public figure analysis." (Petition at 21.)[7] Petitioners seek to support this *ipse dixit* by suggesting that the reportage given to

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[7] Petitioners also object that the Fourth Circuit's analysis below "wholly abandons *Gertz*'s command that a plaintiff's access to the media and assumption of the increased risk of defamatory criticism be taken into account on the question of public figure status ...." (Petition at 21.) They are in error. When relevant, those factors are considered in the second part of the two-part test established under *Gertz* and its progeny. That inquiry was not reached below, because the court of appeals, applying the first part of the test, found that the alleged defamatory statements had not been made in the context of a preexisting public controversy.

the alleged defamatory statements demonstrates that the "alleged breach of contract as to the marketing of Maxzide® [was] hardly an exclusively 'private' matter." (Petition at 22.) This assignment of error lies at the heart of petitioners' plea for review. In a perfervid peroration they argue that:

> When a large, publicly held corporation such as Cyanamid has taken the initiative to throw its massive resources and enormous influence behind the marketing and promotion of a highly regulated product important to the welfare of hundreds of thousands of people and subject to wide debate and discussion within the medical, pharmaceutical and investment communities, it cannot reasonably be said that speech critical of the marketing and promotion of the product is "purely private" and "d[oes] not deal with any issue that could potentially affect the public" —or that the corporation is a "private figure" as to such speech. Review by this Court is necessary to prevent the kind of misconstruction of *Gertz*'s "public controversy" standard that leads, as it did in the Fourth Circuit here, to a result so at odds with both the letter and spirit of *Gertz*.

(Petition at 27.)

Petitioners' assignment of error is mistaken (although even if error were present, mere error would not justify the issuance of the writ). Their argument is founded upon a misunderstanding of the applicable law, and a misinterpretation of the findings made by the court of appeals below.

First, the relevant distinction established by this Court is not one between "exclusively 'private' matter[s]" and matters in which the public has shown some interest, but between

matters of public controversy, understood as "specific public dispute[s] that [have] foreseeable and substantial ramifications for persons beyond its immediate participants" (*Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (analysis cited with approval in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 n.3 (1986)), and all other matters, whether or not they attract public interest or curiosity. When this distinction is correctly understood, it can be seen to apply in this case to differentiate sharply between any public issue related to hypertension therapy using Maxzide® or other potassium sparing diuretics, and the essentially private issue of whether Cyanamid had breached its contract with Mylan —issues that petitioners struggle in vain to conflate.

Second, neither court below, reviewing the factual record in this case, found that any public controversy whatever regarding the contractual adequacy of Cyanamid's marketing efforts for Maxzide® preexisted petitioners' defamatory statements. Moreover, the court of appeals took into account the precise argument petitioners advance here, and specifically found that the defamatory statements "did not deal with" (that is, were wholly unrelated to) any public controversy relating to Maxzide® itself, or otherwise affecting the public:

> No public controversy exists in the present case. The conflict between Mylan and Cyanamid is a purely private contractual dispute about whether Cyanamid used its best efforts to market Maxzide. The allegedly defamatory statements dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public, such as Maxzide's effectiveness or whether Maxzide would

> continue to be distributed. The general public will not be affected by the outcome of this dispute.

(App. 7a.)

Although petitioners suggest the existence of a conflict in principle between the Fourth Circuit's analysis of the public controversy issue in this case and the analyses employed in two decisions from the District of Columbia Circuit, and possibly cases from the Second and Third Circuits, plainly no such conflict actually exists —unless petitioners' objection to the Fourth Circuit's analysis is predicated upon its failure to use the precise words "wholly unrelated" in some talismanic fashion. Although petitioners appear to take the position that the Fourth Circuit applies a different legal test for the relationship between the alleged defamatory statements and the preexisting public controversy than other courts do, petitioners are mistaken on two grounds. First, the Fourth Circuit did not create a legal test for the degree of relationship, but rather made a fact-bound determination that no such relationship existed. Second, in the cases petitioners cite as displaying a conflict in principle with the Fourth Circuit's approach, the courts actually engage in precisely the same sort of factual analysis; the only genuine difference discernible between those cases and this is the outcome of that analysis. *See Tavoulareas v. Piro*, 817 F.2d 762, 773-74 (D.C. Cir.) (en banc) (allegedly defamatory report of nepotism on the part of president and chief executive officer of second largest U.S. oil company found to be "not 'wholly unrelated' to a public controversy where the credibility and integrity of representatives of the oil industry had become an issue[;]" plaintiff found to have personally spearheaded industry response in that public debate), *cert. denied*, 484 U.S. 870 (1987); *Waldbaum*, 627 F.2d 1287, 1299-1300 (public

controversy preexisted regarding commercial viability of cooperatives and certain related policies that plaintiff was publicly identified with; article complained of was "within the protected sphere of reporting" as comment upon the practical outcome of those publicly debated policies); *see also, Contemporary Mission, Inc., v. New York Times*, 842 F.2d 612, 619 (2d Cir.) (article recounting history of religious and business controversy regarding group claiming to be Roman Catholic clergy members constitutionally protected because intertwined controversies remained matters of public concern), *cert. denied*, 488 U.S. 856 (1988); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082-86 (3d Cir.) (illegal drug trafficking was preexisting public controversy affording constitutional protection to article on marijuana agribusiness in the U.S. naming plaintiff among other examples of lawyers or law students publicly identified as participants in that business), *cert. denied*, 474 U.S. 864 (1985).

Although petitioners characterize the defamatory statements here as "speech critical of the marketing and promotion of the product" (Petition at 27), they paint with far too broad a brush. The comments complained of here as defamatory cannot be equated, for example, with those of a public interest group complaining of excessive promotion of an older therapy or of inflated product claims, or of a physicians' organization criticizing direct-to-consumer advertising of prescription drugs. Whether or not such remarks would ultimately be afforded the protection of the *Sullivan* "actual malice" standard, the court of appeals would not have described them as having no effect on an issue of genuine concern to the general public. Here, to the contrary, the remarks complained of are the comments of one party to a contractual dispute about the alleged breach by the

other party. The court of appeals was unquestionably correct in describing this dispute as a private quarrel, the outcome of which would not affect the general public.

III. NO CONFLICT REQUIRING THIS COURT'S GUIDANCE EXISTS AMONG THE CIRCUITS OR STATE COURTS OF LAST RESORT REGARDING THE PROPER APPLICATION OF *GERTZ* TO CORPORATE DEFAMATION PLAINTIFFS.

A. Petitioners Fail to Establish the Existence of a Conflict In Principle Regarding the Treatment of Corporate Plaintiffs Under *Gertz*.

Although petitioners strain to find a basis for the exercise of the writ in this case in what they describe as the "especially difficult" issue of determining public figure status in cases in which the plaintiff is a corporation (Petition at 10), they are unable to identify any genuine conflict in principle among the circuits or the highest state courts regarding the application of *Gertz* in such cases. Petitioners cite few cases displaying any explicit doctrinal divergence from the analysis in *Gertz*, and those isolated cases neither deviate from *Gertz* in result, nor pose any conflict of a type this Court should address.

Petitioners lay greatest stress upon *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976). In that case, the district court opined that the private interests the Court sought to protect in *Gertz* were personal interests of a type not "associated with corporate activity." *Id.*, at 955-56. Noting that traditional tort rules in the District of Columbia permitted a corporation to maintain a defamation action to recover for false imputations regarding its financial

soundness or business ethics, the district court recognized that corporations do have some reputational interests meriting protection. *Id.* It attempted to accommodate those interests by applying what it considered to be the plurality rule from *Rosenbloom*, holding that "actual malice must be proven with convincing clarity in any libel action brought by a corporation against a mass media defendant, if the defendant establishes that the publication in issue concerned matters of legitimate public interest." *Id.*, at 956. Petitioners cite no subsequent decisions that follow *Martin Marietta*; in particular, they cite no decision of any circuit court or state court of last resort that takes the same approach.

Petitioners cite *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 487-88 (Minn. 1985) (en banc), as another example of a court that has adopted a wholly different analysis in place of that prescribed in *Gertz* because the *Gertz* analysis "so ill-fits the corporate defamation plaintiff." (Petition at 12.) In that case, however, no clear-cut rejection of *Gertz* can be found. Indeed, the court in *Jadwin* adopted the limited purpose public figure category established in *Gertz* and applied it to the corporate plaintiffs in that case, in the process distinguishing "between the ordinary incidents of a corporation's manufacturing and selling products on the one hand, and a corporation's business activities which are particularly clothed with the public interest on the other." *Id.*, at 487. The court then used this distinction to demonstrate an underlying doctrinal consistency among cases that petitioner here portrays as being in conflict, including *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P.2d 14 (1979) (en banc), *cert. denied*, 449 U.S. 886 (1980); *American Benefit*

Life Ins. Co. v. McIntyre, 375 So. 2d 239 (Ala. 1979); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977), and *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977). In dealing with a corporate defamation plaintiff, each of these courts considered whether the disputed statements touched upon an area of public concern, or upon the smaller range of issues within which a corporation's reputational interests are akin to those of a private natural person. The range of outcomes in those cases for the most part reflects differing factual circumstances, rather than divergent views of the applicable law, and the approach followed in each case is fully consistent with the public controversy analysis mandated by *Gertz*.

It is also significant to note that the analysis this Court adopted in *Gertz* was not intended to "federalize" the law of defamation. Under *Gertz*, states were explicitly permitted "to retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.*, at 345-46. By implication, states also retain the ability under *Gertz* to make judgments concerning such essentially state law issues as the nature and extent of a corporation's reputational interests that will be recognized by the tort law, and the degree of protection that will be afforded those interests, as long as the application of state law does not invade the protected free speech interests identified by the Court. Thus, any difference on this point that results from a refusal by a state to recognize any private reputational interest on the part of a corporation does not pose an issue that this Court needs to address, because it expands, rather than constricts, the scope of protected expression. *Compare, e.g., Martin Marietta*, 417 F. Supp. at 955 (in District of Columbia,

corporation has no personal reputation and may be libelled only as to limited issues), *with Bruno & Stillman, Inc.*, 633 F.2d at 590 (no support in applicable New Hampshire libel law for "assumption that a corporation's interest in protecting its reputation is less important than that of an individual person[,]" expressly distinguishing *Martin Marietta*.)

In the various circuits in which this issue has been considered, little difficulty in applying *Gertz* to corporate defamation plaintiffs has been encountered. To the contrary, the decisions of the various circuits have been marked by a readily discernible consistency both in analysis and outcome. Cases decided in the Fourth Circuit are exemplary in this regard. The approach taken there to cases involving corporate plaintiffs begins with the observance of this Court's admonition in *Gertz* (cited above at p. 14) that the "public figure question" demands a fact-specific, contextual analysis. *Gertz*, 418 U.S. at 352, *cited* at *Veribanc*, 866 F.2d at 687, and at *NFCR*, 705 F.2d at 101. And, indeed, engaging in a close contextual analysis in each of those cases enabled the court to make reasoned distinctions about the limited purpose public figure status of the respective plaintiff corporations.

In *NFCR*, the plaintiff foundation had engaged in "massive solicitation efforts" ostensibly to raise funds for research into a cure for cancer. The Foundation accompanied many of its solicitations with "claims and comments" in which "it extolled its judicious use of donated funds in finding a cure for cancer, where it declared its objective to make 'NFCR a household word,' and where it asserted the need 'to present [NFCR's] case to the jury of the American people.'" *Id.*, at 101. Based on these facts, the court had no difficulty finding that the Foundation had "thrust itself into the public eye," and that it

"did not unwittingly become the subject of publicity with respect to its approach to cancer research or its use of donated funds." *Id.*, at 101, 102. The court therefore found that the Foundation was a limited purpose public figure with respect to those specific issues, and applied the "actual malice" standard to the Foundation's claim that it had been defamed by a report issued by the Council of Better Business Bureaus that accused the Foundation of spending too high a percentage of the funds it raised on administration and fund-raising, as opposed to research, and challenged statements in the Foundation's fund raising materials as inaccurate and misleading.

In *Veribanc*, the court applied the same approach, but arrived at a different outcome based upon differing facts. In that case, plaintiff Blue Ridge Bank was found to occupy "a position of considerable importance" in its community, had engaged in extensive promotional efforts for its banking services, and had demonstrated access to the media. *Veribanc*, 866 F.2d at 686-87. The court nevertheless found that the Bank was not a limited purpose public figure with respect to the issue of its corporate financial health, and was not required to meet the "actual malice" standard in a defamation action against a reporting service that had mistakenly included the Bank on a list of potentially insolvent banks. *Id.*, at 687-88, *compare*, *Dun & Bradstreet, Inc.*, 472 U.S. at 761-63 (speech "solely in the individual interest of the speaker and its specific business audience" does not concern a public issue, and does not require the protection of the "actual malice" standard). The court found that the Bank had not thrust its internal operations (specifically, its financial health) into the public eye, and thus had not voluntarily injected itself, or been drawn into, a "pre-existing public controversy" over that issue. *Id.* The court distinguished

NFCR factually on the ground that the Foundation had itself fomented a public issue concerning its use of funds:

> Central to our conclusion [in *NFCR*] was both the presence of extensive advertising (creating a high public profile and demonstrating media access) *and a direct relationship between the promotional message and the subsequent defamation* (indicating plaintiff's pre-existing involvement in the particular matter of public concern and controversy.)

Id., at 687 (emphasis added).

In the Third Circuit, a similar analytical approach has yielded results consistent with those in *NFCR* and *Veribanc* in a closely analogous pair of cases. *Compare, Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (finding the corporate defamation plaintiff to be a limited purpose public figure on the issue of the quality of the meat it sold through an intensive media campaign extolling its product, in the wake of local television news coverage of alleged misrepresentations about the quality of that meat), *with U. S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 939 (3d Cir.) (refusing to invoke limited public figure standing in a defamation action arising out of a comparative advertising campaign between two health care providers, and holding: "[w]e believe a corporation must do more than claimants have done here to become a limited purpose public figure ...."), *cert. denied*, 498 U.S. 816 (1990). Similar analyses, applying *Gertz*, have yielded compatible results in other circuits; *see Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494-98 (11th Cir. 1988) (corporate plaintiff, operator of a jai alai fronton, voluntarily entered highly regulated industry with

few participants and foreseeably held prominent role in, and had ability to influence outcome of, public controversy over corruption in jai alai gambling); *Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 9552 (5th Cir. 1983) (corporate defamation plaintiff did not "thrust itself" into public controversy by mere advertising of services); *Bruno & Stillman, Inc.*, 633 F.2d at 589-92 (public figure status not imposed upon corporate defamation plaintiff which was "paradigm middle echelon, successful manufacturer-merchant" when no pre-existing public controversy regarding product quality, or evidence of scale or nature of promotional efforts appeared in record).

Cyanamid submits that none of these cases yields a result that is repugnant to the applicable First Amendment concerns, or that exhibits an analytical approach that is in conflict, as a matter of principle, with the analyses undertaken by other courts in similar cases. A careful reading of the relevant cases shows that the instances of a "clear split among jurisdictions" that petitioners purport to discern regarding the weight given to the factors of whether the plaintiff corporation is in a regulated industry (Petition at 14), or whether the plaintiff corporation employs extensive advertising (Petition at 16), are in fact only differences in emphasis arising out of particularized, fact-bound inquiries in each case. Despite strenuous efforts, petitioners have failed to identify any cognizable conflict in this area meriting this Court's consideration.

B. Even If the Issue were Presented Here, Cyanamid Should Not Be Considered an All-Purpose Public Figure.

Although the record below does not support the raising in this case of any issue regarding the application of the all-purpose public figure category delineated in *Gertz*, (as Cyanamid has shown above at pp. 6-9), petitioners assert the existence of a conflict regarding that issue between the Fourth Circuit and the Fifth Circuit. The asserted conflict proves to be only a speculative exercise on petitioners' part, however, based upon petitioners' distorted reading of *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, __ U.S. __, 114 S.Ct. 1587 (1994) —a case in which the plaintiff corporations were specifically held to be private figures for purposes of a libel claim.

In *Snead*, a U.S. railroad and its president brought an action for breach of a confidential relationship and misappropriation of trade secrets against two British corporations, which counterclaimed for libel based upon a press release issued by plaintiffs accusing them of "international theft," "industrial espionage," and "international piracy." The plaintiffs' claims were dismissed after a bench trial, and damages were awarded on the libel counterclaim. Plaintiffs appealed the award of damages on the grounds, among others, that the British corporations were public figures, and that "actual malice" had not been proved.

Contrary to petitioners' assertions here (Petition at 19), the Fifth Circuit in *Snead* did not purport to set out a three-part test for all-purpose public figure status. Rather, the court disavowed the existence of any general rule, stating:

> Because the two *Gertz* justifications for the public figure/private figure dichotomy do not suggest a general rule to be applied to corporations, the inquiry must be made on a case-by-case basis, examining all the relevant facts and circumstances. We suggest several factors here but we do not suggest that these are the only factors to consider.

Id., at 1329. On the facts in *Snead*, the court found that the corporations in questions were private figures.

No conflict between *Snead* and the Fourth Circuit's analysis in this case actually exists. The "conflict" petitioners assert is merely one between the outcome below, and the result they assert would have obtained had the Fifth Circuit applied what they assert to be the rule in *Snead* to facts of this case. (Petition at 18-20.) But Cyanamid submits that such "thought-experiments" are not the basis upon which this Court exercises its prerogative of review by writ of certiorari. The court below was not asked by petitioners to consider the all-purpose public figure issue, and petitioners err in their hypothetical application of *Snead* to this record.[8] Petitioners identify no record facts here that bear upon two of the three relevant factors identified in *Snead*, including "the notoriety of the corporation to the average individual in the relevant geographical area" or "the frequency and intensity of media scrutiny" that Cyanamid normally receives. *Id.*, at 1329.

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[8] It should be noted that much, if not all, of the factual material petitioners draw from the record to support their position now was absent from the record before the district court when it granted summary judgment before trial, and none of it was cited from the trial record to the court of appeals by petitioners in response to Cyanamid's appeal below.

Ultimately, petitioners appear to urge a stark and radical change in the law: they invite the Court to hold either that all corporations, or all corporations of an unspecified size, be treated as public figures in all cases. They offer no example of any court below that has so held, and no well-reasoned public policy basis arising out of the case at bar to support this Court's consideration of such a fundamental change in the law. Cyanamid respectfully submits that the petition is therefore utterly without merit.

CONCLUSION

For the foregoing reasons, respondent American Cyanamid Company respectfully submits that the petition should be denied.

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July 25, 1995

Respectfully Submitted,

Rodney O. Thorson*
Mark E. Herlihy

Skadden, Arps, Slate
Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7500

Attorneys for Respondent
American Cyanamid Company

* *Counsel of Record for Respondent*